

FEDERAL MAGISTRATES COURT OF AUSTRALIA

GIDO-CHRISTIAN v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 825

MIGRATION – Migration Review Tribunal – visa cancellation – Subclass 100 (spouse) visa – breach of ss.101 and 105 of *Migration Act 1958* – cancellation under s.109 – whether jurisdictional error – whether breach of s.101 of *Migration Act 1958* – whether Tribunal misunderstood its task or took into account irrelevant consideration – whether Tribunal erred in making a finding on whether parties in a genuine marriage – standard of proof – whether Tribunal asked wrong question.

Migration Regulations 1994, regulation 1.15A

Migration Legislation Amendment Act (No.1) 1998

Migration Act 1958, ss.99, 100, 101, 105, 107, 108, 109, 359A, 368(1)

Saleem v Migration Review Tribunal [2004] FCA 234

Sandoval v Minister for Immigration and Multicultural Affairs [2001] FCA 1237

Burton v Minister for Immigration and Multicultural and Indigenous Affairs [2005] 149 FCR 20

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12

WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 88 ALD 568

Iyer v Minister for Immigration and Multicultural Affairs [2000] FCA 52

Iyer v Minister for Immigration and Multicultural Affairs [2000] FCA 1788

Mumtaz v Newson (Unreported decision 18 July 1995)

Greyhound Racing Authority (NSW) v Bragg (Unreported 22 December 2003)

S14/2002 v Refugee Review Tribunal [2004] FCAFC 171

Applicant: BERNANDITA GIDO-CHRISTIAN

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: SYG 96 of 2006

Judgment of: McInnis FM

Hearing date: 25 August 2006 and 7 November 2006

Delivered at: Melbourne (and by video link to Sydney)

Delivered on: 31 May 2007

REPRESENTATION

Counsel for the Applicant: Mr B. Zipser

Solicitors for the Applicant: Lewis Law

Counsel for the First Respondent: Mr S. Lloyd

Solicitors for the First Respondent: Australian Government Solicitor

ORDERS

- (1) The title of the First Respondent be changed to “Minister for Immigration and Citizenship”.
- (2) The Application be dismissed with costs.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 96 of 2006

BERNANDITA GIDO-CHRISTIAN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks judicial review of a decision of the Migration Review Tribunal (the Tribunal) dated 12 December 2005. In its decision, the Tribunal affirmed a decision of the First Respondent's delegate to cancel a Partner (Migrant) (Class BC) visa held by the Applicant.

Background

2. On 19 September 1992, Neville Bruce Christian (Mr Christian) married Edith Christian (Edith) at Narwee, New South Wales.
3. By proceedings filed in the Family Court of Australia in 1998 (Application Number SY6229 of 98), Edith applied for dissolution of her marriage to Mr Christian. The Family Court granted a decree nisi

for the dissolution of the marriage on 7 August 1998. The decree nisi of dissolution of the marriage became absolute on 8 September 1998 (Supplementary Court Book p.79).

4. The Applicant is the sister of Edith.
5. In January 1998 the Applicant applied for a Subclass (300) (Prospective Spouse) or 309 (Spouse) visa. The application was received by the First Respondent's Department office in Manila on 16 January 1998. According to the application, the Applicant commenced a relationship with Mr Christian on 1 November 1996 (Supplementary Court Book p.3). Mr Christian completed a sponsorship form for the Applicant (Supplementary Court Book p.24). In the sponsorship form Mr Christian states that he ended his relationship with Edith on 1 November 1996. In the same form he claims that he commenced the relationship with the Applicant on the same day (Supplementary Court Book p.25).
6. In the sponsorship form, Mr Christian refers to his current address as "Nanowie Street, Narwee" (the Nanowie Street address).
7. In the declaration which forms part of the Applicant's application for the visa, the Applicant declared, amongst other things, the following:
 - “● *I declare information supplied on or with this form, and any attachments, is complete, true and up-to-date in every detail.*
 - *I did not marry or enter a de facto/common law relationship to become eligible for migration to Australia.*
 - *I understand that if I have given incorrect information, my application may be refused, I may be refused entry to Australia, or I could be removed after I arrive in Australia.”*
8. In support of her application, the Applicant also relied upon a statement dated December 1997 (Supplementary Court Book p.30). In the statement the Applicant sets out details of the manner in which the relationship between her and Mr Christian developed in the following terms:

“In December, 1995, my brother-in-law, Neville Christian, invited me to visit Australia with the dual purpose of seeing my sister once again, whom I missed very much, and to meet his mother. Neville thought that if I got on well with his mother, I may be able to apply to stay in Australia to look after her as a carer. This was due to the fact that my sister did not get on too well at all with Neville’s mother, as she did not realise that his mother was not in good health due to her trying to recover from a nervous breakdown. We all lived together in Neville’s mum’s house but there was a lot of tension as my sister did not like the situation. Also, due to the long hours my sister worked, Neville’s marriage was also being affected. I looked after Neville’s mum till May, 1996, when I returned home to Manila.

In July, 1996, because the situation between Neville’s mother and my sister got worse, Neville found a nice flat near to his mother’s house and he and my sister moved in. In August, 1996, I returned to Sydney and lived with Neville’s mother and looked after her once again. She was very happy to have me there with her again as she was very lonely through the day and was frightened to stay in the house at night.

As Neville worked from home for over 20 years, I got to see him every day and sometimes helped him with his work. We became very close as I pitied him with his marriage problems with my sister and he confided in me. Neville and my sister thought that if they were separated from his mother their marriage might improve.

Unfortunately, this did not happen and they separated on the 1st November, 1996, when Neville returned home to live with his mother and me once again.

During the next couple of months, the relationship grew to the point that we fell in love. After Christmas, 1996, we told my sister of our love and she became upset.

But, after a short time, she realised that we were serious and that she now had her own life to get on with. I am happy to know that my sister accepts the situation and she holds no grudges and does not blame Neville or me for what has happened and we are all still good friends.” (sic)

(Supplementary Court Book p.30)

9. The application was supported by statutory declarations from neighbours of the Applicant and Mr Christian. The first neighbour, Mr James Burgess, relevantly stated:

"I first met Bernadette Gido on her arrival in Sydney Dec 1995 till May 1996 until she returned from her homeland in the Phillipines on the 31st August 1996.

Her nominator Neville Christian has been my neighbour for 37 years.

I have been on speaking terms with them practilly every day, and they a very happy couple." (sic)

(Supplementary Court Book p.31)

10. A second statement from another neighbour, Mr Janvrin, relevantly stated:

"I FIRST MET THE APPLICANT WHEN SHE ARRIVED DECEMBER 95. SHE WENT BACK HOME AGAIN IN MAY 96 AND RETURNED AGAIN AUG 96 THE NOMINATOR NEVILLE CHRISTIAN I HAVE KNOW 36 YEARS AND SINCE MY RETIREMENT 13 YEARS AGO I SEE HIM MOST EVERY DAY AS I DID BERNADETTE GIDO WHEN SHE WAS HERE." (sic)

(Supplementary Court Book p.34)

11. By letter dated 29 June 1998, Mr Christian provided letters and cards sent by him to the Applicant after her return to Manila from Sydney.
12. On 17 July 1998, Mr Christian was interviewed by an officer of the First Respondent's Department in Sydney. In the interview report (Supplementary Court Book pp.54-55) the officer refers to the "background on relationship" which includes a reference to Mr Christian stating that he had lived with his mother all his life and had been there alone with her since his brother and sister left home to marry. He refers to his mother renting from the housing commission and that accounts are in his mother's name. He stated he lived at the Nanowie Street address. The report relevantly then includes the following:

"Mr. Christian stated his marriage was not going well; this was because they were sharing with his mother; and thus there were two women in the house. However, the main problems between

himself and Ms. E Gido started when she went to work in February 1994, she became more independent, she had her own money and freedom, she started to change.

In mid 1995, Ms. B. Gido was finishing a computer course, they (Mr. Christian and Ms. E Gido) brought her (Ms. B. Gido) out to Australia in December 1995, she stayed till May 1996. While Ms. Gido was in Australia this first time she helped in the house and looked after Mr. Christian's mother who had had a nervous breakdown.

Mr. Christian also stated that the relationship between himself and Ms. B. Gido started around December 1995, his wife was going to work eleven hours a day.

Mr. Christian and Ms. E. Gido moved to a unit 'up the road' in July 1996. Both Mr. Christian and Ms. E. Gido stayed in the unit till Mr. Christian 'decided to call it quits' at the end of November 1996. He moved back home (while Ms. E. Gido stayed in the unit); at this stage Ms. B. Gido was there on her second visit. In December 1996, Mr. Christian and Ms B. Gido started their defacto relationship (man and wife like).

...

I was a bit concerned in regard to why Mr. Christian had not applied for a divorce from Ms. E. Gido, till recently. He stated they did not think about it, in Filipino society divorce was not normal, and they thought that he and Ms. B. Gido, would live in a defacto relationship. Ms. E. Gido is divorcing Mr. Christian. She was out of work at the time and therefore it would not cost her anything. Ms. E. Gido is working now and is self sustaining. Mr Christian and Ms. B. Gido are planning to get married after she comes to Australia." (sic)

(Supplementary Court Book p.55)

13. The officer then stated the following as a conclusion in the report:

"From the information provided during the interview I am satisfied this is a genuine relationship. A person could be concerned that Mr. Christian and Ms. E. Gido may be attempting to bring Ms. E. Gido's sister into Australia under an application for a subclass 300 visa. Possibly this is all that is available, to bring Ms. B. Gido to Australia permanently. I consider Mr. Christian was genuine at interview and he answered the concerns with reasonable logical answers. I consider that benefit of the

doubt applies in this instance. Not that I consider there is any particular reason, from the interview with Mr. Christian to-day, that this relationship between Mr Christian and Ms. B. Gido is not genuine.”(sic)

(Supplementary Court Book p.56)

14. It is further noted that in the interview report the officer records the following:

“Mr. Christian stated he had forwarded all telephone accounts to your office and he had no photos with him – he has photos of when they were at the Gold Coast, but they show them separately as he would not give his camera (expensive) to someone else to take the photos of them both together.”

(Supplementary Court Book p.54)

15. Following an interview with the Applicant in Manila, a delegate of the First Respondent, in a decision dated 31 July 1998, refused to grant the Applicant a subclass 309 visa (Supplementary Court Book pp.81-84). Relevantly, the delegate stated:

“The applicant and sponsor have provided statements at interview in support of the application. They have also provided telephone bills, photos and evidence that Editha Christian resides at a different address to Mr Christian.

*Nevertheless, I consider that the purported sequence of events in this case require the applicant and sponsor to provide a high standard of evidence that their story is in fact true. I do not consider this evidence has been provided. The statements at interview do not demonstrate that the applicant and sponsor have any great knowledge of one another or any significant commitment to a marital relationship. The evidence of communication cannot be given great weight given the strong possibility Ms Editha Christina is using Mr Christian’s telephone for calls to her family in the Philippines and the small number of photographs provided do not weigh significantly in their favour.”
(sic)*

(Supplementary Court Book p.84)

16. As indicated earlier in this judgment, the decree nisi of dissolution of marriage between Mr Christian and Edith became absolute on 8 September 1998. On 16 September 1998, Mr Christian applied to the

First Respondent's Department for review of the delegate's decision. In support of that application, Mr Christian provided a statement (Supplementary Court Book p.89). In his statement he referred to material provided in support of the application and made reference to the interview between the Applicant and the delegate. He alleged that certain statements were made by the delegate which led him to believe that a favourable report would be forwarded by the delegate. Mr Christian apparently attended an interview in Australia with an officer of the First Respondent's Department. He then, under the heading "Summary," states:

"I feel that the photographs and telephone accounts that I have supplied should be sufficient for you to change the decision and allow Bernandita Gido to come to Australia so that we can be married as we love each other deeply."

17. On 17 February 1999 a delegate of the First Respondent affirmed the original decision refusing to grant to the Applicant a subclass 309 spouse visa (Supplementary Court Book p.90-95). The review decision reveals that the officer was not satisfied that the Applicant is the "spouse" as defined in regulation 1.15A of the *Migration Regulations 1994*. That decision was reached after consideration of financial aspects, household arrangements, social aspects of the relationship and the nature of the commitment between the parties.
18. Between 14 March 1999 and 21 March 1999, Mr Christian was out of Australia. His inbound migration card revealed an address as Nanowie Street. On 16 March 1999, Mr Christian and the Applicant were married in Manila. The Applicant on 6 April 1999 applied for a short-stay (visitor) (class TR) subclass 676 visa (the short-stay visa). The Department granted the short-stay visa on 16 April 1999 which was subsequently cancelled by the First Respondent's Department on 21 April 1999. A letter dated 22 April 1999 was forwarded to the First Respondent's Department in Manila from an unknown author, marked "confidential" (Court Book pp.158-159). In that letter the author states:

"This is to officially report the abovementioned people who are committing fraud and misleading informations to the Australian Immigration. It is of my great concern on how people manipulate the system to the extent of intentionally committing a 'show'

marriage to be able to let BERNADETTE GIDO enter Australia as a migrant.” (sic)

19. The author of that letter then referred to the relationship between Mr Christian and Edith and relevantly stated:

“... Edith is the true wife of Neville Christian whom he sponsored as a wife in 1992. Bernadette has been struggling to enter the country as immigrant, nothing has happened during her twice visit here in Australia, she had hoped to find someone to marry but ended up disappointed ...” (sic)

20. The author further states:

*“For their last resort, Neville and Edith Christian filed for a divorce to be able for Neville to marry Bernadette is papers only. Neville went to the Philippines last month to marry Bernadette (Edith's sister) to be able to find her the way to migrate to Australia. **The truth of this matter, Neville and Edith Christian are still currently living together as husband and wife here in Australia...**” (sic)*

21. The letter referred to Mr Christian and Edith living at an address in Parry Avenue, Narwee (the Parry Avenue address). Reference was made to the Nanowie Street address as being the address used by Mr Christian to sponsor the Applicant in her application for migration to Australia.

22. On 3 May 1999, Mr Christian applied to the Immigration Review Tribunal (the IRT) for review of the decision dated 17 February 1999. The IRT application became an application for review to the Migration Review Tribunal on 1 June 1999 pursuant to the transitional provisions in the *Migration Legislation Amendment Act (No 1) 1998*. That Tribunal conducted a hearing on 25 October 2001. Evidence was given in person by the Applicant and also by Mr Christian and Edith. That Tribunal delivered a decision dated 10 December 2001 (Christian, Neville (2001) MRTA 5868). A complete copy of the Tribunal decision was tendered (Exhibit A1) as the copy provided in the Supplementary Court Book (pp.128-149) was incomplete.

23. In its decision dated 10 December 2001, the Tribunal set out in some detail the evidence which then included two statutory declarations dated 30 August 1997 and 12 December 1997 from two friends

supporting the genuineness of the relationship between the Applicant and Mr Christian. The Tribunal summarised the evidence of Mr Christian in some detail. It described his evidence as being given in a "forthright and trustworthy manner" (Exhibit A1, p.13). That summary also included the following summaries of the evidence of Edith and the Applicant (referred to as the 'visa applicant'):

“37. *A summary of the visa applicant's evidence is as follows:*

During her first visit to Australia, they all lived together and Neville was just her sister's husband. She looked after Neville's mother, who she calls 'Mum' and they got on well together. Before she returned, they went to the Department to see how she could stay in Australia. They told the Department that she was looking after Neville's mother but she thinks that eventually they were told that she couldn't apply on this basis. When she returned in August 1996, she lived with Neville's mother. Neville and Edith had moved out as Edith wanted her own flat. She knew that Edith and Neville were having problems as they argued and in November 1996, Neville moved back home. She knew that she loved Neville but she was shocked for her sister. They told Edith together and she was very upset although she had some idea about what was going on. She was very happy and very comfortable with Neville. She is happy spending time with Neville's mother and the three of them are happy together. She explained that the relationship with Neville just happened, it wasn't planned, particularly as he was her sister's husband. She didn't think about the age difference and it hasn't been a problem for them.

Since she has been back in the Philippines, they have been in contact by telephone and last year she would regularly send him letters. Neville regularly sends her money each month. He sends about 4,000 pesos each time. She and Edith are friends. She asked for a chance to be with her husband as she loves him very much.

38. *A summary of Edith Christian's evidence is as follows:*

She met Neville when she was working for his brother. She couldn't remember when they started to go out together but they were married in 1992. She returned to the Philippines and lodged a visa application and returned with Neville in 1993. She lived with Neville and his mother and the relationship was OK. When she started working 12 hours a

day, she was tired and they argued. Neville's mother has a history of nervous breakdowns and she found it difficult to adjust to living with her. They decided to get a flat on their own to help their marriage but things didn't improve and they decided to call it quits as they were always angry with one another.

When Bernadette and Neville told her about their relationship in December 1996, she was upset but realised after a while that they were in love. Bernadette and Neville were together all day and she was working all day. She and Neville decided to get divorced and they went to see a solicitor who suggested that she divorce Neville because she was not employed at the time. They discussed a property settlement but decided to leave things as they were because the property was on the market.

Last year, Neville had a heart attack and she has been helping him with his work. She works shift work and in return for her work, he collects her when she finishes late at night as she is scared to take taxis at that time of night.

She said that she does not make calls from Neville's house but sometimes when she is there helping him she will give Bernadette or her parents a quick call. She couldn't explain why there would be calls to her parents' number from Neville's house early in the morning.

She gives Neville and Bernadette her blessing.”

24. In considering the social aspects of the relationship between Mr Christian and the Applicant, the Tribunal relevantly stated:

“... The review applicant indicated that he and the visa applicant did not go out together that much, as they preferred to stay at home and be together. Occasionally, they would go out to the pictures or to go shopping. The Tribunal is satisfied that the visa applicant and the review applicant spent most of their time together whilst they lived together. There is evidence of social activities such as an outing to the Easter show and family gatherings. The Tribunal considers that evidence from the review applicant's mother and siblings would have been desirable but finds that the lack of this evidence does not detract from the consistent evidence, which the visa applicant and the review applicant have presented.”

25. In its decision dated 10 December 2001, the Tribunal decided to remit the application made by the Applicant for a Spouse (Provisional) (Class UF) visa to the First Respondent's Department for consideration with a direction that the Applicant be taken to have met the criteria for a subclass 309 Spouse (Provisional) visa. The Tribunal referred to certain criteria but noted it was not in a position to decide what it described as "the remaining criteria".

26. In its decision, the Tribunal concluded:

“60. Having considered all the available evidence, the Tribunal is satisfied on balance that the visa applicant is the spouse of the review applicant, an Australian citizen. Although the Departmental officer who interviewed the review applicant was satisfied that the visa applicant was the spouse of the review applicant, the delegate considered that due to the circumstances of the case, the visa applicant needed to satisfy a higher standard of proof. The delegate did not explain why he considered that a higher standard of proof was required but it appears to be due to the unusual circumstances leading to the commencement of the relationship, particularly the fact that the review applicant was married to the visa applicant's sister at the time.

61. The Tribunal examined the available evidence in great detail and had the benefit of talking to the visa applicant, the review applicant and the visa applicant's sister at great length and found that their evidence has remained consistent. Since the date of the primary assessment and MIRO's decision, considerably more evidence has been submitted. The Tribunal accepts that the relationship between the visa applicant and the review applicant is unusual because the review applicant was married to the visa applicant's sister at the time the relationship developed. The Tribunal considers that it is also unusual in that the review applicant, except for a short period, has remained friendly with his ex-wife. The Tribunal and the review applicant have disclosed from the time of application that the visa applicant and her sister remain on good terms, as does the review applicant. The Tribunal considers that it is unusual that the review applicant did not discuss divorce with his ex-wife until sometime after the visa applicant left Australia. The Tribunal considers it unusual that the review applicant still owns a property jointly with his ex-wife. The Tribunal considers that the visa applicant and the review

applicant have provided plausible explanations for the unusual circumstances surrounding their relationship. The Tribunal considers that the unusual circumstances surrounding the relationship do not detract from the other evidence that it is genuine and continuing relationship. The Tribunal placed considerable weight on the fact that the visa applicant and the review applicant have lived together for a period of 10 months in 1996/1997, which is a significant period. The Tribunal is satisfied that during this period they lived as husband and wife. The Tribunal is satisfied that the visa applicant and the review applicant maintained their commitment to each other whilst living in separate countries as demonstrated by their level of contact with one another, the attempts of the visa applicant to visit the review applicant, the review applicant's visit in 1999, that they have married since the visa applicant lodge the application and the evidence of the financial support that the review applicant has provided to the visa applicant."

27. On 22 January 2002 the First Respondent's Department received what has been described as an "anonymous dob-in letter". It is referred to in the chronology of the decision of the Tribunal dated 12 December 2005 (Court Book p.210). A copy of the letter does not appear in the material before the court, hence reliance is placed upon the Tribunal reference in the chronology as follows:

"... received 22/1/02: 4 page written anonymous dob-in (on 2004 file) - Informant aware that Mr C had "won his case". Aware they had tried to apply for a carer visa. Alleges that when couldn't get carer visa Mr C divorced E and married B. Alleges Mr C works at mother's address and parks car there but sleeps elsewhere. Alleges Mr C still in spousal relationship with exwife, E."

28. That summary of the "dob-in letter" refers to the Applicant as "B", Mr Christian as "Mr C" and Edith as "E".
29. Additional documents were provided to the First Respondent's Department by the Applicant during 2002. On 13 November 2002 the Applicant was granted a subclass 309 Spouse (Temporary) visa. On 6 February 2003 the Applicant was granted a Class 100 Partner (Permanent) visa.
30. On 3 February 2004 the New South Wales Fraud Squad received an allegation from a named person, a copy of which does not appear in the

material. Again it is necessary to refer to the summary of the material set out in the Tribunal's chronology as follows:

“3/2/04 allegation received by NSW Fraud Squad from a named person. Possibly a different person to previous dob-ins. Alleges spousal relationship with 1st wife (E) still continuing and that Mr C and E reside at 30 Graham Rd, Narwee together. Alleges Mr C uses his mother's address (8 Nanowie Street) to cover up the fraud. Alleges Mr C is known by Edith's workmates as her husband. Informant knew of RA's previous travels to Australia and the inquiry for a carer visa.”

(Court book p.210)

31. It appears that Edith is referred to as "E", Mr Christian referred to as "Mr C", whilst the Applicant is referred to as "RA".
32. On 24 June 2004 the First Respondent's Department sent the Applicant a notice of intention to consider cancelling her visa pursuant to s.109 of the *Migration Act 1958* (the Migration Act) ("the NOICC") (Court Book pp.11-14).
33. The NOICC relevantly set out ss.101 and 105 of the Migration Act which relevantly provide:

“Section 101 Visa applications to be correct

A non-citizen must fill in his or her application form in such a way that:

- (a) all questions on it are answered; and*
- (b) no incorrect answers are given.*

Section 105 Particulars of incorrect answers to be given

(1) If a non-citizen becomes aware that:

- (a) an answer given in his or her application form; or*
- (b) an answer given in his or her passenger card; or*
- (c) information given by him or her under section 104 about the form or card; or*

(d) a response given by him or her under section 107;

was incorrect when it was given, he or she must, as soon as practicable, notify an officer in writing of the incorrectness and of the correct answer.

(2) Subsection (1) applies despite the grant of any visa.”

34. Unfortunately, the copy of the NOICC which appears in the Court Book (p.11) has the first page obliterated by a delivery confirmation advice receipt, though the part obliterated appears to be simply a reference to the section set out above.
35. The copy of the NOICC also appears to be incomplete as the sentence appearing at the top of page 12 does not appear to have an introduction.
36. In any event, it is common ground that the NOICC refers to declarations signed by the Applicant on 16 January 1998 in support of her application including the declarations set out earlier in this judgment (see paragraph [7]).
37. In the NOICC the author relevantly states:

“Information held by the Department indicates that you were not in a genuine and continuing marital relationship with Neville Christian during the processing of your application. Further, that Mr Christian remains in a marital relationship with your sister, Edith.

Based on the information before me, it appears that you may have provided incorrect information on your application lodged with the Department on 16 January 1998 and throughout the processing of this application. In particular, you may have failed to provide information to the Department about the true nature of your relationship with Neville Christian.

If you did not comply with Sections 101 and 105, your visa may be cancelled. It does not matter whether you deliberately or inadvertently did not comply.”

(Court Book p.12)

38. It is noted that ss.99 and 100 are also relevant in considering the NOICC to the extent that those provisions relate to "information" and "incorrect answers". They provide:

“Section 99 Information is answer

Any information that a non-citizen gives, causes to be given or that is given on his or her behalf to the Minister, an officer or a person or Tribunal reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given orally or in writing and whether at an interview or otherwise.

Section 100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave the answer or caused the answer to be given did not know that it was incorrect.”

39. Relevantly, the NOICC then further states:

“The Migration Act 1958 gives you the opportunity to comment on these possible grounds for cancellation and to give a written answer why your visa should not be cancelled. Your answer should say:

- why you think you have complied, or why you have not complied, with Sections 101 and 105; and*
- why you think your visa should not be cancelled (even if you think you have complied).”*

(Court Book p.13)

40. By letter dated 2 July 2004 (Court Book p.15), apparently written by Mr Christian though signed by both Mr Christian and the Applicant, reference was made to the NOICC. Details were given regarding the claimed problems experienced with the processing of the spouse application and the following statement appears in the letter:

“Since her arrival in Australia on 10th January, 2003, Bernandita & I have a happy & peaceful life, and she has been extremely helpful in attending to my elderly mother.”

41. The letter provides the Nanowie Street address as the address for the Applicant and Mr Christian.

42. A letter dated 15 July 2004 was forwarded to Mr Christian and the Applicant from the business manager, fraud control and compliance, of the First Respondent's Department. The letter states that the Minister had asked that the author respond on her behalf and in part states:

“As you may know, all decisions made by the Department of Immigration and Multicultural and Indigenous Affairs (the Department) whether onshore or offshore, are made under the provisions of the Migration Act 1958 and the Migration Regulations (the law). While the Department can sympathise with your belief that the decisions made by the Department are unfair, it is the law not fairness that determines decisions.”

(Court Book p.16)

43. Reference is then made to the limited power of the Minister to intervene. It appears that an extension of time was then granted by the Department to the Applicant to respond to the NOICC. Ultimately, a letter was forwarded to the Department by the Applicant and Mr Christian dated 26 August 2004 (Court Book p.19) expressing concern about what is referred to as the "dob-in letter". The authors state:

“We are not querying the Law, just the decision-making process.”

44. It would appear that the Applicant and Mr Christian were given until 6 September 2004 to respond to the NOICC. Hence by letter dated 2 September 2004 (Court Book p.20), Mr Christian responded to the NOICC and in part stated:

“It is very difficult for my wife, Bernandita, or myself to comment on your request, as we do not really know what information you want from us. All documentation signed and supplied to you by us since 16th January, 1998, is both true and correct in all details to the best of our knowledge. In order to try and clarify your request, I offered to have an interview with you to discuss and fully explain whatever you needed to know about our side of the story, but you declined this offer.”

45. The letter then refers to a Freedom of Information Act application and reference to the Commonwealth Ombudsman's Office.
46. By letter dated 1 November 2004 (Court Book p.24), a representative of the First Respondent's Department stated:

“In order to finalise your case you and your husband are required to attend an interview at this office at 9-30am on Monday 22 November 2004.”

47. The Applicant and Mr Christian attended for an interview with the Department as requested. Notes of the interview were made by the interviewing officer (Court Book pp.25-28).
48. In the Tribunal decision, reference is made to the departmental interview in the following terms:

“29. On 22 November 2004, the delegate conducted an interview with the review applicant and Mr Christian. According to the Department’s record of interview, the review applicant provided the following information at her interview;

- She first met Mr Christian through her sister, Edith (his former wife), when he visited her sister’s home in the Philippines in 1991 or 1992.*
- Her relationship with Mr Christian began in 1996 when she was staying with them at Nanowie Street. Her sister Edith was working long hours and she saw more of Mr Christian than her sister. Edith moved out in late 1996, about November, and has not lived there since. She later claimed that her sister, Edith, and Mr Christian moved to Parry Avenue in July 1996 but in November 1996 Mr Christian move back to Nanowie Street. Edith remained at Parry Street and then moved to Graham Road.*
- She lives at Nanowie Street with Mr Christian and his mother. Edith sometimes visits and she and the review applicant work at the same place. Mr Christian sometimes picks up Edith.*

30. Mr Christian provided the following information;

- He first met the review applicant when she came to stay in 1995. She arrived in December 1995 and stayed until May 1996. She returned in August 1996. When he and Edith married they initially lived with his mother but in July 1996 they moved to Parry Avenue. The review applicant stayed with Mr Christian’s mother when she arrived in August 1996.*

- *Mr Christian returned to his mother's home in November 1996. He separated from Edith and a relationship developed with the review applicant. After this time Edith continued to live alone, she never returned to Nanowie Street to live though she sometimes visited on weekends to do her washing. Sometimes they all go grocery shopping together, including Edith. He and Edith get on well now, as friends. He sees Edith about once a week or fortnight, when she visits his house. The review applicant sees her 2-3 days a week, sometimes at work.*
- *Mr Christian stated that he knows the dob-in letter originated from someone who works in the Embassy in Manila. He also complained of incompetence of Department officers (D1, f.110-113)."*

(Court Book pp.204-205)

49. The Applicant and Mr Christian also provided statements supporting their claim that they were in a genuine and continuing relationship. The statements were from a medical practitioner, a pharmacist, a blind manufacturer and a real estate agent.
50. The medical practitioner provided two reports. The first dated 20 July 2004 (Court Book p.29) refers to Mr Christian's mother, though relevantly states, "*She is being cared for by her son, Neville and daughter-in-law, Bernadette (since her arrival in Australia on 11 January 2003).*" A second letter dated 16 November 2004 from the same doctor (Court Book p.30) states:

"This is to certify that Mrs Bernadette Christian has accompanied Mr Neville Christian to this surgery during his consultation with me. As she is working shift work, I have not seen her on a regular basis. During Mr Neville Christian and Mrs Marie Christian's consultations, we would often discuss Bernadette. It would appear that Mrs Bernadette Christian and Mr Neville Christian have a genuine relationship."

51. The letter from the pharmacist dated 8 September 2004 (Court Book p.31) relevantly states:

"This is to state that to the best of my knowledge Bernadette Christian has lived at address: No.8 Nanowie Street, Narwee since January 2003 when she arrived in Australia."

She lives with her husband, Neville Christian, and mother-in-law, Marie Christian at the above address. Both Neville and Marie have been known to me for a period of five years."

52. The letter from the blind manufacturer dated 10 September 2004 (Court Book p.32) states:

"Neville Christian has been a good customer of our company for over twenty years now. During this time, Neville has always proven to be honest and reliable and always takes pride in his work.

Over recent years since he has met Bernadette, they are more often than not together when they pick up or deliver blinds to us. They have always both appeared to me to be happy together."

53. The letter from the estate agent dated 16 November 2004 (Court Book p.33) states:

"I have known Neville Christian professionally & socially for about 15 years.

During this time I have found Neville to be an honest and reliable person.

I first met Neville's friend Bernadette when she came to Australia in 1996. Since 2003 when she returned from the Philippines, I regularly seen Bernadette in company with Neville."

54. Other correspondence was forwarded to the Minister and relevant officers of the Department by Mr Christian (Court Book pp.19, 20 and 36).

55. On 10 December 2004 a delegate of the First Respondent made a decision, cancelling the Applicant's subclass 100 visa (Court Book p.40). The delegate stated in part:

"The Department has decided that you did not comply with sections 101 and 105 of the Act. Your visa was cancelled on 10 December 2004. The reasons for not cancelling your visa were not considered sufficient to outweigh your non-compliance.

A copy of the decision record is attached."

56. In the decision record the delegate states:

“Based on the information before me, I find that Mrs Christian failed to provide correct information on her application regarding the relationship between herself and Mr Christian and failed to advise the department of the incorrect information, therefore finding that Mrs Christian has breached Sections 101 and 105 of the Migration Act (1958).

I find that had the correct information been before the delegate Mrs Christian would not have been entitled to the grant of a subclass 100 visa.”

(Court Book p.47)

57. On 15 December 2004 the Applicant applied to the Tribunal for review of the delegate's decision. Both the Applicant and Mr Christian then forwarded letters to the Tribunal including the following:

- (a) a letter from Mr Christian and the applicant to the department dated 3 January 2005 (Court Book p.120);
- (b) a letter from Mr Christian and the applicant to the tribunal dated 21 February 2005 (Court Book pp.143-144);
- (c) a letter purportedly from Edith to Electoral Commission of New South Wales dated 7 January 2005 and a reply stating that Edith's address on the electoral roll was Graham Road, Narwee (Court Book p.62) and it is further noted that the same letter indicates date enrolled as "7 September 2004";
- (d) a document handed by Mr Christian to the tribunal on 10 February 2005 (Court Book pp.110-136).

58. Pursuant to s.359A of the Migration Act, the Tribunal, by letter dated 27 April 2005, invited the Applicant to comment on particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review. Specifically, the Tribunal invited the Applicant to comment in writing on the following information:

- “● *Information before the Department indicating that you were not in a genuine and continuing marital relationship with Neville Christian during the processing of your application. Further, that Mr Christian remains in a marital relationship with your sister, Edith.*

- *Information before the Department indicating that you may have provided incorrect information on your application lodged with the Department on 16 January 1998 and throughout the processing of the application. In particular that you may have failed to provide information to the Department about the true nature of your relationship with Neville Christian of the above period. The Tribunal will consider any request for any request for an extension carefully, and advise you, in writing, whether an extension of time has been granted."*

(Court Book pp.145-146)

59. By way of response dated 10 May 2005 (Court Book p.153), Mr Christian referred to earlier correspondence and in part stated, "We have nothing more to add to that information supplied."
60. On 21 July 2005 and 24 October 2005 the Applicant and Mr Christian attended a hearing before the Tribunal.
61. On 27 October 2005 the Tribunal sent the Applicant a second letter pursuant to s.359A of the Migration Act (Court Book pp.175-179). In the second s.359A letter the Tribunal set out a chronology of various events. It then states:

"The above may be adverse as it casts doubt on a number of your claims and on your evidence.

- *You have claimed that Edith gave the Nanowie Street address on her inbound cards on 10/6/01 and 20/6/04 as that is the address given at the back of her passport and crew members told her to write this. The above information casts doubt on this claim as Edith had given the Parry Ave address on inbound cards on 2/6/99 and 17/8/02. Mr Christian claimed at the October hearing that he had written the Parry Ave address on the 17/8/02 card – but Mr Christian was not on the flight with Edith.*
- *The white pages continue to show Mr Christian and Edith listed together. This is despite them having been divorced since 1998 and Edith having changed addresses throughout that period. This could be adverse as it may indicate that Mr Christian and Edith are still recognised socially as being a spousal couple and reside together.*

- *Mr Christian's tax return ending June 1999 and prepared in February 2000 lists Edith as his spouse. Member MacDonald had been provided with a letter from Mr Christian's accountant stating this was a mere error. However, the tax return declared Edith's taxable income and her date of birth. This may be adverse as it is difficult to believe this could be a mere error.*
- *Mr Christian stated at the October hearing that the Port Macquarie properties (1 owned solely by himself, the other jointly mortgaged with Edith) had been sold so he could gain the Disability Pension. He stated the profit was paid into his Superannuation fund and that Bernandita was the beneficiary to this fund. He stated Edith had not been given her share of the profit as she didn't need it at the moment. This may be adverse as it could indicate that the financial affairs of Edith are still interwoven with those of Mr Christian despite them having been divorced since 1998. This may be adverse as this may support the allegations that Mr Christian and Edith continue to be in a spousal relationship.*
- *The dob-in's cover 1998 to 2004. Some of the dob-in's have been quite accurate in the information supplied and are from various informants. These could indicate that Mr Christian and Edith continue to be in a spousal relationship and that the relationship with Bernadita is contrived."*

(Court Book p.177)

62. On 7 November 2005 the Applicant and Mr Christian responded to the second s.359A letter (Court Book pp.181-185). The response addresses each of the concerns raised in the Tribunal's chronology in some detail and specifically addressed the other issues of concern set out earlier in this judgment.
63. As indicated earlier, the Tribunal, in its decision dated 12 December 2005, affirmed the delegate's the visa should be cancelled.

The Further Amended Application

64. The Applicant relies upon a Further Amended Application dated 25 August 2006.

65. In the Further Amended Application the Applicant relies upon four grounds referred to in the following terms in the written submissions of the Applicant:

- “a) The Tribunal, in finding that ‘the review applicant breached s 101 of the Migration Act in the way described in the NOICC’, was required to consider whether three statements made by the applicant in her visa application in January 1998 and particularized in the NOICC, were ‘incorrect’ within the meaning of s 101 of the Act at the time they were made in the manner particularized in the NOICC. The Tribunal’s reasons for decision indicate that the Tribunal either misunderstood this task or took into account irrelevant considerations, giving rise to jurisdictional error (‘Section 101 issue’)*
- b) The Tribunal, in finding that ‘the review applicant breached s 101 of the Migration Act in the way described in the NOICC’, appears to have based this finding on the intermediate finding that the applicant ‘was not in a genuine mutually exclusive spousal relationship at the time of the visa application’. The Tribunal fell into jurisdictional error in making this intermediate finding. (‘Genuine marriage finding issue’)*
- c) The Tribunal, in finding that ‘the review applicant breached s 101 of the Migration Act in the way described in the NOICC’, erred in its application of the appropriate standard of proof (‘Standard of proof issue’)*
- d) The Tribunal asked itself the question: ‘Did the review applicant provide incorrect answers on the application for migration to Australia on 27 October 2000?’ The application for migration to Australia was lodged on 16 January 1998. Hence the Tribunal asked itself the wrong question. In the circumstances, there was jurisdictional error. (‘Wrong question issue’)”*

Section 101 Issue

Applicant's Submissions

66. It was submitted by the Applicant that s.108 of the Migration Act provides that a decision-maker can only cancel a visa if "*there was*

non-compliance by the visa holder in the way described in the notice of intention to consider cancelling a visa.”

67. Reference was made to the NOICC and in particular the declarations set out earlier in this judgment.
68. The Applicant referred to the decision of Allsop J in *Saleem v Migration Review Tribunal* [2004] FCA 234 at [43] and [46] (Saleem) where the court states:

“43 It can be readily accepted that the cancellation of a visa, especially one granting permanency of residence, is a serious matter. It is against that background that one comes to ss 107 to 109 of the Act. The provision of incorrect or false information and the use of "bogus" documents being the matters, broadly stated, that are covered by ss 101, 102, 103, 104, 105 and 107(2) are also potentially very serious matters. It is easy to understand why the Parliament required some precision and specificity in the notice: s 107(1)(a). Particulars of non-compliance with ss 101, 102, 103, 104, 105 or 107(2) are what is called for. One does not give particulars of non-compliance with s 101 by saying (as was submitted by Mr Reilly) that s 101 has not been complied with. It is the specifics (the particulars) of that non-compliance that are required to be given.

...

46 Thus, I accept the submissions of Mr Godwin that in exercising its powers of review under the Act, the Tribunal must decide as the jurisdictional fact (cf Eshutu and SHJB) whether there was non-compliance by the visa holder in the way described in the notice, being the manner particularised in the notice.”

69. It was argued that it is necessary for the court to determine the manner of non-compliance with ss.101 and 109 of the Migration Act particularised in the NOICC. It was submitted that the answer to the question is unclear.
70. It was noted the NOICC sets out three statements in a declaration by the Applicant in the application form but does not propose that any of these three statements are "incorrect answers" within the meaning of s.101 of the Migration Act. Further, it was submitted, the NOICC

asserts the Applicant's "*application was lodged on the basis of you being in a genuine and continuing marital relationship with Neville Christian*". It was submitted that assertion in the NOICC was not what could be regarded as an "answer" within the meaning of s.101 of the Migration Act.

71. Further reference was made to the NOICC which appears earlier in the judgment and in particular the reference in the notice made to information claimed to be incorrect as to the true nature of the relationship.
72. It was submitted that the manner in which the Applicant is alleged to have breached ss.101 or 105 of the Migration Act is set out in those paragraphs and specifically that the Applicant "*provided incorrect information on (her) application lodged with the Department on 16 January 1998*" by failing to provide information to the Department about the true nature of her relationship with Neville Christian. It was argued that there are difficulties with this particularisation of non-compliance namely, a failure to provide information, it was submitted, cannot be an incorrect answer within the meaning of s.101 of the Migration Act. Reliance was placed upon the decision of *Sandoval v Minister for Immigration and Multicultural Affairs* [2001] FCA 1237 at [46] and [51] where the court relevantly states:

"46 *The legislative history itself is a safer guide. The fact that, when enacting s 101, the legislature abandoned the use of the term "misleading" and opted to use "incorrect" suggests that whether an answer passes the test of s 101(b) is to be assessed on what is in, rather than what is omitted from, the answer. The same construction is suggested by the retention of the phrase "false or misleading in a material particular" in s 234(1)(b) and (c) of the Migration Act. (Section 234(1) creates offences, including the offence of making a statement that is false or misleading in a material particular and the offence of delivering a document containing such a statement. The offences can be committed in various situations, including applying for a visa.) Such a construction is in line with the object of the legislation, considered as a whole. An applicant for a visa is expected to give an answer to each question which is correct. Thus, if a question seeks exhaustive information (for instance "Do you have a spouse, de facto, any children, or fiancée who will*

NOT be travelling with you?"), then an omission of any such person will be an incorrect answer. A more open-ended question, such as "Why do you want to visit Australia?" requires an answer that is accurate so far as it goes, but will not be considered to be incorrect because it omits information.

...

51 *For these reasons, I am of the view that it was not open to Mr Vella, as a matter of law, to be satisfied that Mr Sandoval had given an incorrect answer to the question "Why do you want to visit Australia?" in his application form, upon the basis that the answer omitted information that Mr Vella considered to be relevant. Unless he was satisfied that the answer itself, or the material supplied with it, contained incorrect information, he could not lawfully have found that the ground specified in s 116(1)(d) was made out. In purporting so to find, Mr Vella made an error of law, being an error involving an incorrect interpretation of the applicable law. Such an error is a ground for judicial review under s 476(1)(e) of the Migration Act."*

73. It was further argued that it is necessary for the court to determine whether the Tribunal decided there was non-compliance by the visa holder in the way described in the notice. Reference was made to the Tribunal's findings, referred to as the "intermediate findings", as follows:

- “• ‘Mr Christian and Edith continue to be in a spousal relationship’ (CB 212.5)
- ‘The tribunal is not satisfied that any claimed relationship was mutually exclusive’ (CB 212.10)
- ‘[In 1996/1997] any relationship [between the applicant and Neville] was not mutually exclusive as Mr Christian did not separate from Edith until late December 1996’ (CB 213.2);
- ‘The current Tribunal also does not accept that there was a genuine commitment by the review applicant and Mr Christian to each other’ (CB 213.2).”

74. After referring to the significant conclusion of the Tribunal in finding that the Applicant breached s.101 of the Migration Act in the manner described in the NOICC and its finding that the Applicant was not in a

genuinely mutually exclusive spousal relationship at the time of the application and throughout the visa-processing period, it was submitted that there are three problems arising from that conclusion as follows:

- “a) First, the Tribunal does not explain how the applicant breached s 101 of the Migration Act in the way described in the NOICC. Nor is the answer to the question apparent from the Tribunal's reasons for decision. The inadequacy of the Tribunal's reasons for decision indicate that it did not understand the task which it was required to undertake: see *MIMA v Yusuf* (2001) 206 CLR 323 at [59].
- b) Second, the Tribunal appears to state that the applicant breached s 101 of the Act because he ‘was not in a genuine mutually exclusive spousal relationship at the time of the visa application’. However, it is unclear how this is a breach in a manner particularised in the NOICC.
- c) Third, one reason the Tribunal found that the applicant breached s 101 of the Migration Act was because the applicant ‘was not in a genuine mutually exclusive spousal relationship ... throughout the visa processing period’. However, the NOICC asserted that the applicant provided incorrect information in the visa application lodged on 16 January 1998, not at a later date. The Tribunal's reliance on the period ‘throughout the visa processing period’ indicates that it misunderstood its task and asked itself the wrong question, giving rise to jurisdictional error.”

First Respondent's Submissions

- 75. The First Respondent submitted that s.101 of the Migration Act provides that a non-citizen must fill in his or her application form in a way that "(a) all questions on it are answered; and (b) no incorrect answers are given".
- 76. It was submitted that the ambit of this obligation is substantially expanded by the deeming provision contained in s.99, set out earlier in this judgment. The effect of that is that every statement, it was submitted, made by an Applicant or on an Applicant's behalf in support of a visa application including, before any review Tribunal is taken for

the purposes of s.101(b) to be an answer to a question in the visa application form.

77. It was submitted that if the Minister considers the holder of a visa who has been immigration-cleared did not comply with, relevantly s.101, the Minister may give the holder a notice giving particulars of the possible non-compliance (and other information) (see s.107(1) of the Migration Act).

78. It was submitted the obligation to provide particulars contained in s.107(1) has been held to be more confined than that contained in other similar notice provisions, not extending to the need to give particulars of information because of which it is believed there has been non-compliance.

79. The First Respondent referred to *Burton v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 149 FCR 20 per Wilcox J at [22]-[23] where the court states:

“22. *Mr S Lloyd, who appeared for the respondent before me, accepted that Lloyd-Jones FM erred "in considering that the later issuance of a s 375A certificate has any consequences for compliance with s 107. However, in reliance upon a notice of contention filed by his client, he argued the particulars of non-compliance were adequate. He noted that s 107 does not require particulars of the information relied upon by the delegate, unlike other cancellation provisions such as s 119(1) of the Act, but only of the possible non-compliance.*

23. *I agree with Mr Lloyd on this issue.”*

80. The First Respondent submitted that it is not enough to simply assert a breach of a particular section and noted the comments of Allsop J in *Saleem*. It was further submitted, however, that it would be wrong to place "too much emphasis on the precise terms used" (see *Saleem* at [56]). Instead, it was submitted, notices under s.107 should be "read in a commonsense way" (see *Saleem* at [48]) and the decision-maker should address the "substance of the notion that the Applicant and Mr Christian were living as husband and wife" (see *Saleem* at [56]).

81. It was argued that having regard to the principles, it is necessary to consider the language of the NOICC in the present application. An analysis of the notice, it was submitted, reveals the structure was as follows:

- “a) an identification of the sections with which the delegate had a concern that the applicant may have failed to comply;*
- b) an identification of the incorrect “answers”, bearing in mind the broad notion of that word effected by s 99 as including, relevantly:*
 - i) the applicant’s declaration that she “did not marry or enter a de facto/common law relationship to become eligible for migration to Australia”;*
 - ii) that the applicant’s visa application was lodged on the basis that she was in a genuine and continuing marital relationship with Neville Christian;*
- c) an identification of the various decision-making steps leading up to the grant of the applicant’s visa (which was relevant for determining the ambit of “answers”, given s 99);*
- d) notice that the Department held information that indicates that the applicant was not in a genuine and continuing marital relationship with Neville Christian during the processing of your application and, further, that Mr Christian remains in a marital relationship with the applicant’s sister, Edith;*
- e) notice that based on the information before the delegate, it appeared that the applicant may have provided incorrect information on her visa application lodged with the Department on 16 January 1998 and throughout the processing of the application (again embracing the deeming effect of s 99) – this is then particularised as the applicant having failed to provide accurate information about the true nature of her relationship with Neville Christian;*
- f) other matters required to be included by the Act.”*

82. It was then submitted that the notice contrary to the Applicant's submissions is clear. Throughout the entirety of her application for the spouse visa, the Applicant maintained she was in a genuine and

continuing marital relationship as opposed to marrying for immigration convenience and that she had been informed that her "answers" to this effect were not accurate. When read in a commonsense way and looking at the substance of the matter, it was submitted, the NOICC readily identifies the critical matters that the Applicant needed to address. Though she may not have known all the details of the information held by the delegate, it was submitted, the NOICC made clear *"what was the nature of the alleged non-compliance and the applicant and Mr Christian were able to and did address these matters both before the delegate and the Tribunal"*.

83. It was submitted that the Tribunal made a finding that the Applicant was not in a genuine mutually exclusive spousal relationship at the time of the visa application and throughout the visa-processing period and this finding, it was submitted, meets precisely the non-compliance issue raised in the NOICC, contrary to the complaints raised by the Applicant, set out earlier in this judgment. It was argued that the Tribunal's reasons make it clear that a finding to this effect would make good the inaccuracy specified in the notice in breach of s.101 of the Migration Act.
84. It was further noted that the Applicant complained that the Tribunal's reliance on the visa-processing period revealed that it failed to consider the correct question; namely, what was said in the original application form. It was submitted the Tribunal appreciated that s.101 has an expanded operation by reason of s.99, something also implicit in the s.107 notice itself which used the same language. It was submitted there is no error of law. On the contrary, it was submitted, the Tribunal understood the NOICC was referring to the Applicant's information provided in the original form and throughout the application-processing period to the effect that her marriage was genuine and continuing as opposed to one entered into for migration purposes.

Reasoning

85. The First Respondent's submissions are correct. It is artificial to consider the submissions made for and on behalf of the Applicant which appear in my view to disregard the operation of s.99 of the Migration Act. Section 99 of the Migration Act clearly provides what

could only be described as a very broad deeming effect which considerably expands the ambit of the obligations to include a broad range of information which may properly be regarded as information for the purpose of s.101.

86. I am satisfied that in the present case the NOICC satisfactorily complied with the legislative requirements. I am satisfied that the core issue both in the original form and throughout the process was whether or not the Applicant's marriage to Mr Christian was genuine and continuing rather than one entered into for migration purposes. The information in my view, which is clearly evident and which is the subject of the NOICC, includes by virtue of the operation of s.99 information of a kind identified by the First Respondent in the submissions before this court. I accept that the structure of the notice has been accurately and relevantly set out in the First Respondent's submissions referred to earlier in this judgment.
87. Notwithstanding the authority of the court in *Saleem*, it is not appropriate to abandon in the analysis of this issue commonsense or the substance of the issue; namely, the genuineness of the relationship. Whilst there may be some degree of frustration on the part of the Applicant and indeed Mr Christian given the history set out in detail earlier in this judgment, that does not of itself lead the court to conclude that there has been a defect in the NOICC in the manner proposed by the Applicant. I am satisfied, applying the deeming provision of s.99, that in the present case, as submitted by the First Respondent, the NOICC does provide sufficient information and it is not a case where a specific incorrect answer needs to be established when dealing with what can only be described as a straightforward and significant notion namely, the genuineness of the relationship.
88. It follows for the reasons given that I accept the First Respondent's submissions and this ground should fail.

Genuine Marriage Finding Issue

Applicant's Submissions

89. It was submitted on behalf of the Applicant that the finding by the Tribunal that "*the review applicant breached s 101 of the Migration Act in the way described in the NOICC*" was based upon what is described as an intermediate finding that the Applicant "*was not in a genuine mutually exclusive spousal relationship at the time of the visa application*". Reference was made to the finding of the Tribunal set out earlier in this judgment.
90. It was argued that in determining whether jurisdictional error arises from this finding, reference needs to be made to the evidence. It was suggested that evidence was given which was favourable to the Applicant's assertion that she was in a genuine mutually exclusive relationship at the time of the visa application.
91. Reference was made to evidence referred to earlier in this judgment including evidence from the Applicant and Mr Christian together with earlier evidence provided by Edith to the first Tribunal and otherwise evidence from neighbours. It is not necessary to recite that evidence as much of it has been referred to earlier in this judgment including the reference from the neighbours for the earlier judgment and evidence from the medical practitioner, the pharmacist, a blind manufacturer and real estate agent who provided material for the second Tribunal.
92. Reference was made to evidence relied upon by the Tribunal in reaching its decision that the Applicant and Mr Christian were not in a genuine mutually exclusive relationship. That evidence included the incoming passenger card for Edith where the Nanowie Street address was provided. It also included evidence from Mr Christian's accountant who prepared a tax return for Mr Christian for the year ending 1999 which stated that Edith was Mr Christian's spouse during the year ending June 1999. Reference was made to the White Pages issue referred by the Tribunal, set out earlier in this judgment.
93. The Applicant then, after reviewing the evidence including the letters described as "dob-in letters", submitted that there were a number of complaints about the Tribunal's finding. First, it was argued that the

Tribunal should have realistic regard to the material and to give it real and genuine consideration. In the present case, it was submitted, the Tribunal failed to mention and therefore did not grapple with most of the evidence submitted in favour of the applicant's position. By way of example, reference was made to what was described as the "*six independent witnesses*" who gave evidence that the parties were in a genuine spousal relationship. Likewise, it was claimed that there were many other documents supportive of the claim.

94. Accordingly, it was submitted that the Tribunal failed to have regard to relevant evidence and that this constituted jurisdictional error. In the alternative it was argued the Tribunal was selective in the information on which it relied and accordingly had failed to make its decision in good faith which likewise gives rise to jurisdictional error. In the alternative it was argued the Tribunal failed to act judicially.
95. It was further submitted that one piece of evidence relied upon by the Tribunal upon which it based its decision was that on 10 June 2001 and 20 June 2004, Edith completed an incoming passenger card in which she wrote the Nanowie Street address as her intended address in Australia. It was noted the Tribunal stated, after referring to that matter, the following:

"51. In the Tribunal's opinion Edith has given different addresses at different times as she was involved in the contrived marriage of her sister and Mr Christian..."

(Court Book p.211)

96. It was submitted that that reasoning was because Edith wrote the Nanowie Street address on her passenger card on two occasions, leading to a conclusion that the marriage between the Applicant and Mr Christian was contrived, did not follow the evidence, nor was it supported by the evidence. The Tribunal's decision, it was submitted, was therefore "*irrational, illogical and not based on findings or inferences of fact supported by logical grounds*" (see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [38]).
97. It was submitted that the Tribunal's reasoning appeared to be that the fact that Edith wrote the Nanowie Street address on her incoming

passenger card on two occasions appears to be that although she has "probably 'moved out of the Nanowie Street address as claimed'", she may still live there occasionally. Reference was made to the Tribunal's conclusion as follows:

"52. Edith may have moved out of the Nanowie Street address as claimed. However, it is certainly not clear that Mr Christian continued to reside solely at the Nanowie Street address with his mother and the review applicant. In the Tribunal's opinion it is unclear where the 3 interested persons have resided at different times."

(Court Book p.211)

98. It was argued that the finding did not make sense and that the Tribunal has speculated as to what might be the case, for example that in 2001 and 2004 Edith might still have been residing at the Nanowie Street address, but has not made any findings as to what may have been the case. It was argued that it is impermissible for the Tribunal to make findings of fraud against the Applicant, Mr Christian and Edith on the basis of speculation and this was an aspect of the Tribunal's obligation to act judicially (see *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 88 ALD 568 at [19]-[22] and [40]-[49]).
99. It was further argued that in the present case the Tribunal fell into jurisdictional error in not summoning Edith as a witness. It was argued that the circumstances in the present case "were exceptional or rare". In support of that submission reference was made to the earlier Tribunal decision to take oral evidence from Edith leading it to find that the relationship was genuine and that if the current Tribunal wanted to make a contrary finding it should have obtained oral evidence from Edith. Further, if the Tribunal wanted to make adverse findings arising out of the incoming passenger card, it should have summonsed Edith as a witness. The Applicant repeated the claim that a finding of fraud is a serious allegation and that the Tribunal, it was submitted, should have interviewed Edith before making that finding.
100. Reference was made to the Tribunal's finding that "*the financial arrangements support the allegation that Mr Christian and Edith continue to be in a spousal relationship*" (Court Book p.212). It was

noted the Tribunal set out evidence supporting that finding though submitted that none of the evidence supports the finding. Accordingly, the Tribunal failed in the jurisdictional error. In the alternative, the finding was based on “no evidence” or the Tribunal did not make a decision in good faith.

101. Further criticism was made of the Tribunal’s note that “*the white pages continue to show Mr Christian and Edith listed together at Graham Road*” (Court Book p.212) and that it placed “*great weight on the continuing joint telephone listing*” (Court Book p.212). It was noted the Tribunal did not reject or disagree with the evidence before it that Edith resided at 30 Graham Road and accepted Mr Christian continued to reside at the Nanowie Street address. It was submitted that it follows that Edith controlled the white pages listing for 30 Graham Road. Accordingly, there was no evidence, it was submitted, to support the Tribunal’s consequential finding that Mr Christian was declaring to society at large that he and Edith resided together. Questions were raised in any event as to the relevance of this material.

102. Further criticism was made of the Tribunal’s finding when it placed “great weight” on the “lack of evidence from family and friends” that the parties were in a genuine relationship (Court Book p.212). It was noted the Tribunal stated:

“... *there was a lack of evidence from [Neville’s] family in Australia, ...*”

(Court Book p.213)

103. It was submitted that the independent witnesses, referred to earlier, had been ignored which constitutes jurisdictional error. Further, it was argued that in the alternative the Tribunal had wrongly concluded that the Applicant and Mr Christian could not be in a genuine spousal relationship unless Mr Christian had obtained such evidence from “family and friends”.

104. An attack was made upon the Tribunal’s conclusion referred to earlier in this judgment as follows:

“60. *The Tribunal disagrees that the couple lived together in a spousal relationship for a period of 10 months in 1996/1997. At that time any relationship was not mutually*

exclusive as Mr Christian did not separate from Edith until late December 1996. The review applicant departed Australia in late August 1997 so any relationship was not for the stated 10 months.”

(Court Book p.213)

105. It was submitted those findings were problematic as the Tribunal made a finding that was “irrational, illogical and not based on findings or inferences of fact supported by logical grounds”. The premise that Mr Christian did not separate from Edith until late 1996 and therefore the relationship between the Applicant and Mr Christian over the subsequent ten or so months was “not mutually exclusive” was a conclusion that, as I understand the submission, was regarded as illogical. Further, it was argued that there was no evidence to support a finding by the Tribunal that Mr Christian “did not separate from Edith until late December 1996”. Reference was made to the evidence of Mr Christian who claimed to have “decided to call it quits” at the end of November 1996 following which he moved back to the Nanowie Street address while Edith remained at the Parry Street address. It was argued on the basis of the evidence that the Applicant and Mr Christian resided together for nine months before the Applicant returned to Manila. Focus by the Tribunal on the small point, it was submitted, indicates a lack of good faith giving rise to jurisdictional error.

First Respondent’s Submissions

106. The First Respondent referred to what it describes as six complaints under this heading set out earlier in this judgment. It was submitted by the First Respondent that the Applicant had acknowledged that the Tribunal had evidence which could support a contrary conclusion to the claim by the Applicant. The First Respondent summarised the findings of the Tribunal and/or part of its reasoning in the following terms:-

“a) The Tribunal recognised that it needed to ask and answer two questions: (i) whether the review applicant contravened ss 101 and/or 105 of the Migration Act in the way described in the s 107 notice; and (ii) (if so) whether it is appropriate that the review applicant’s visa be cancelled?”

- b) *The Tribunal sets out a chronology in significant detail. This included reference to each of the “dob-in” letters that had been received, highlighting their content.*
- c) *The Tribunal noted that the significance of the incoming passenger cards completed by Edith Christian (the review applicant’s sister and the review applicant’s husband’s former spouse) was not that their content was incorrect. Rather, the cards were accepted as accurate at the time of their completion (10 June 2001 and 20 June 2004) and as indicating that Edith Christian had lived at 8 Nanowie Street, Narwee, the address at which the review applicant claimed to have lived with Mr Christian at all relevant times, during periods when the review applicant claimed that Edith Christian was living elsewhere. The Tribunal considered that, if Edith Christian was living at 8 Nanowie Street with her former husband, this cast doubt on the claim that that relationship had ended.*
- d) *The Tribunal considered that the explanation why Edith Christian gave different addresses at different times on her incoming passenger cards (sometimes at 8 Nanowie Street and sometimes at 6/4 Parry St) was because she was involved in the contrived marriage of her sister (the review applicant) and Mr Christian.*
- e) *The Tribunal noted that Edith Christian may have moved out of 8 Nanowie Street as claimed but considered that it was not clear that Mr Christian resided exclusively at the Nanowie Street address. It was unclear where the three had resided at different times.*
- f) *The Tribunal gave weight to the fact that Mr Christian’s 1998/99 tax return listed Edith Christian as his wife for the full year 1 July 1998 to 30 June 1999, not the review applicant. This was so even though Mr Christian and Edith had been divorced during that financial year and in circumstances where the tax return was completed by Mr Christian’s long time accountant who was a family friend and frequent visitor to their home. The Tribunal did not accept, in these circumstances, that it was a mere error of carrying over information from the previous year, especially when it contained Edith Christian’s taxable income for the 1998/99 year.*
- g) *The Tribunal then discussed certain financial information, which revealed that many years after their divorce, Mr*

Christian and Edith Christian still had interwoven financial arrangements. For example, when a property co-owned by both had been sold for a profit, the share belonging to Edith Christian was put into Mr Christian's superannuation fund because, so it was said, Edith did not need the money at that time. The Tribunal considered that the nature of the financial arrangements supported a finding that Mr Christian and Edith Christian continued to be in a spousal relationship.

- h) The Tribunal placed significant weight on the fact that the current phone book revealed that Edith and Neville Christian continued to reside together. This was particularly significant in circumstances that none of Mr Christian's family had given evidence in support of the review applicant's case.*
- i) The Tribunal gave weight to the fact that the review applicant had not declared her marriage to her employer and that she was known at work by her maiden name. She had not nominated Mr Christian as her beneficiary under her superannuation scheme.*
- j) The Tribunal characterised the arrangements between Mr Christian and the review applicant and Edith Christian as revealing significant financial pooling between the first and third but little between the first and second.*
- k) The Tribunal did not agree with the conclusions of the Tribunal that had considered the genuineness of the review applicant's marriage, having regard to the additional information before it (referred to above) as well as the lack of evidence from the review applicant's family and friends, lack of social activities, absence of a property settlement between Mr Christian and Edith Christian (who still co-owned a property at that time) and the fact that any mutually exclusive relationship was shorter than the 10 months stated by the former Tribunal.*
- l) The current Tribunal did not accept that the review applicant and Mr Christian had a genuine commitment to each other.*
- m) The Tribunal decided to give "some weight" to a letter in 1999 that indicated that Mr Christian had divorced Edith in order to enable the review applicant to migrate as a spouse. This was given that the author of the letter included*

information that suggested that he or she was aware of a range of matters personal to the review applicant and her husband.

- n) The Tribunal gave some but not great weight to a letter written in 1999 alleging that Mr Christian was still in a spousal relationship with his ex-wife, Edith.*
- o) The Tribunal decided to give more weight to a letter written in 2004 again stating that Mr Christian was still in a spousal relationship with his ex-wife and that his relationship with the review applicant was contrived.*
- p) Ultimately, the Tribunal found that the review applicant had breached s 101 of the Act in the way described in the s 101 notice.”*

107. After setting out the relevant findings of the Tribunal it was submitted that there was no failure to deal with adverse evidence. The First Respondent submitted that the Tribunal is not obliged to give reasons explaining why adverse evidence was rejected or even explaining if any weight was given to it. The obligations of the Tribunal are set out in s.368(1) of the Migration Act where the Tribunal is required to provide a written statement which:-

- (a) sets out the decision of the Tribunal on the review;
- (b) sets out the reasons for the decision;
- (c) sets out the findings on material questions of fact; and
- (d) refers to the evidence or any other material on which the findings were based.

108. Reference was made to the decision of *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 52 per O'Connor J who stated:-

“The applicant relied on a number of authorities supporting an interpretation of s430(1)(d) which would require a Tribunal to deal expressly in its reasons, with probative evidence adverse to the findings it made and, in its reasons, explain why such evidence is rejected or not preferred.

In my view, the proper interpretation of s430(1)(d) does not impose that obligation. What is required is that the Tribunal make

findings supported by probative evidence, on matters material to its conclusions as to the refugee status of the applicant. The fact that there is contrary evidence is irrelevant to this statutory obligation.

Counsel for the respondent argued that s430(1) should be understood as being supportive of the “no evidence” ground (s476(1)(g)) of the Act where an applicant must show that there was no evidence to support a critical fact. The existence of contrary evidence is irrelevant to an obligation to indicate the evidence which supports a finding. I agree with that submission. In this case, the Tribunal considered all the claims of the applicant, referred to them both in the reasons and the findings made and came to the conclusion, based on probative evidence, that the applicant was not a refugee. In so doing the Tribunal applied the correct relevant tests enunciated in binding authorities and, in setting out its reasons for the conclusions reached, complied with its obligations under s430 of the Act. None of the grounds for review are made out.”

109. It was submitted that the decision of O'Connor J on appeal was approved by the Full Court in *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 per Heerey, Moore and Goldberg JJ at [11].
110. It was submitted that that authority along with others means that s.368(1) of the Migration Act does not impose a duty to deal with all the adverse material. It is not open to the Court to infer from the fact that evidence adverse to the findings made by a Tribunal has not been mentioned that it has not been properly considered.
111. Reference was made to the specific issues of evidence referred to by the Applicant including the witness statements from neighbours and others. It was submitted that in the present case it could not be claimed the Tribunal has failed to address in detail strong and probative evidence and further noted that the nature of the evidence in this application ranged from weak through equivocal to strongly negative. It was submitted the Court cannot be satisfied the Tribunal failed to have regard to relevant considerations or acted in bad faith or acted irrationally in the manner as alleged by the Applicant or indeed at all.
112. Specific reference was made to the incoming passenger cards and it was submitted that it was open to the Applicant to provide material

from her sister if she wished to do so or thought that it might assist her application given that she had been provided with an opportunity to comment on the evidence in the s.359A letter (Court Book p.177). It was submitted that it was open to the Tribunal to consider the material before it from the Applicant's sister and give such weight as it considered the material merited.

113. When dealing with the financial arrangements the Tribunal it was submitted was entitled to consider and explain the material upon which it based the conclusion that the financial arrangements support an allegation that Mr Christian and Edith continued to be in a spousal relationship.
114. Likewise it was submitted that reference to the White Pages evidence whilst not leading to a definitive finding was part of the reasoning of the Tribunal that Mr Christian may split his time between the Nanowie Street address and the address of Edith. The Tribunal it was submitted gave weight to the entry in the White Pages in the context where there was an absence of reliable evidence from family and friends to the effect that they were aware of the marriage between Mr Christian and the Applicant. Specific reference was made to the content of the statements set out earlier in this judgment. It was submitted there is no jurisdictional error arising out of this evidence.
115. Likewise it was submitted that when the Tribunal referred to there being little reliable evidence from family and friends it was open to it to consider that lack of evidence from any of them was significant. This did not impute a standard that there had to be such evidence but rather weight could be given to its virtual absence without revealing any legal error.
116. It was submitted there is no inference that could be drawn that the Tribunal had ignored the evidence of the six witnesses referred to by the Applicant. There were weaknesses in those statements which were evident from their content set out earlier in this judgment. Only one witness it was noted might be said to be a friend of Mr Christian and he did not refer to the Applicant as Mr Christian's 'wife' but rather referred to her as his 'friend'.

117. It was submitted that the reasons given by this Tribunal for departing from the views of a former Tribunal are not ultimately relevant to its decision. It was just one of a number of matters considered but ultimately it was claimed the present Tribunal had more information than was before the original Tribunal. Even if there was an error in explaining the departure from the former Tribunal's finding that could only constitute an error of fact and was not a jurisdictional error.

Reasoning

118. In my view the Tribunal in the present case has examined in detail in a manner free of jurisdictional error the significant and crucial issue of whether the parties were in a genuine and continuing marital relationship. It has done so by referring to the material albeit on occasions not referring to each and every piece of specific evidence which may have provided the basis for an alternative finding.
119. As a matter of law I am satisfied as submitted by the First Respondent that the legislation does not require the Tribunal to refer to each and every piece of evidence in its reasoning process. It is required to make findings which are supported by probative evidence on material issues relevant to the application. The mere fact that the Applicant may highlight a body of evidence which may lead to an alternative conclusion does not of itself demonstrate that the Tribunal has breached its statutory obligations.
120. In the present case there was ample probative evidence which would provide a basis upon which the Tribunal could reach its conclusion. It was not bound to accept nor indeed apply the evidence of the six witnesses. I accept the criticism of that evidence made by Counsel for the First Respondent that at best the comments made by the witnesses are general and vague. They do not precisely provide any or any adequate basis upon which the Tribunal would necessarily be required to form the view that the relationship between the parties was a genuine relationship for the purposes of the legislation.
121. In my view the Tribunal when considering the incoming passenger cards, the financial arrangements, the White Pages as well as the evidence from the six witnesses has done nothing more than to make

an assessment of those matters and reach a conclusion on the facts reasonably open to it free of jurisdictional error. It is not for this Court to analyse the facts in an alternative manner and nor is it for the second Tribunal to necessarily make a decision based upon the first Tribunal's reasoning or to otherwise explain in detail the reasons for its departure from the first Tribunal's decision. I accept the submissions made for and on behalf of the First Respondent that there is no jurisdictional error arising out of the manner in which the Tribunal departed from the conclusion reached by the earlier Tribunal.

122. I do not accept that there is any statutory obligation on the part of the Tribunal in the circumstances of this case to call Edith as a witness. I do not accept that the present case could properly be described as one which is "exceptional or rare". Whilst it is true that the earlier Tribunal obtained oral evidence from Edith, that of itself does not lead me to conclude that this was a somewhat exceptional or rare case. Indeed the first Tribunal having been given the benefit of the evidence of Edith, though in the absence of subsequent material clearly available and which was made the subject of the s.359A letter by the second Tribunal, should have alerted the Applicant to the desirability of calling appropriate evidence in support of the application. That evidence may well have included the evidence from the Applicant's sister. The failure by the Applicant to call that evidence should not be a failure then visited upon the Tribunal. Whilst there may be a number of explanations concerning the Nanowie Street address they are merely alternative factual conclusions.
123. In the present case I am satisfied that the Tribunal's factual findings were reasonably open to it and they did not of themselves, albeit relating to Edith, require the Tribunal to call Edith as a witness. Likewise, although by inference the adverse finding against the Applicant may lead to a conclusion that the application was made in order to advance a migration application, it does not necessarily mean that that finding which may or may not amount to a finding of fraud is a sufficient basis upon which the Tribunal should have called Edith to give evidence. It was very clear in the material that this was a key and crucial issue. It will be equally clear to the Applicant that in those circumstances where she had formed a relationship with her sister's husband prior to any divorce that the Tribunal may well make a

significant adverse finding whereby an inference of fraud may be raised. In those circumstances it is incumbent upon the Applicant to provide further evidence from Edith and again I am not satisfied in those circumstances that the Applicant having been provided with clear notice of this significant crucial issue can then transfer responsibility to calling Edith to the Tribunal. I am not satisfied the Tribunal has erred in the manner in which it dealt with the evidence and nor am I satisfied that there is any jurisdictional error arising out of the failure to call Edith. I do not regard this as a particularly “exceptional or rare” circumstance.

124. In my view it was reasonably open to the Tribunal to draw a conclusion that there was little reliable evidence from family and friends. That was a general conclusion reasonably open to it free of jurisdictional error. As indicated earlier the other evidence provided was sadly lacking in detail and not surprisingly the Tribunal did not rely upon that evidence. I can see no error in the manner in which the Tribunal dealt with that evidence nor any error when it found that there was “little reliable evidence from family and friends”.
125. For those reasons it follows that this ground should fail. To the extent that it was suggested the Tribunal lacked good faith in making its decision it follows for the reasons given that where the Tribunal has made a finding of fact free of error it cannot in my view be suggested that simply because an adverse finding of fact has been made that that finding is one which demonstrates a lack of good faith. Any suggestion therefore of a lack of good faith in my view should therefore fail. Likewise, I do not accept that the findings of fact made by the Tribunal could be regarded as illogical or irrational or demonstrating that the Tribunal had failed to act judicially.

Standard of Proof Issue

Applicant's Submissions

126. The Applicant referred the Court to the decision of the Federal Court in *Mumtaz v Newson* (Unreported decision 18 July 1995) where Lindgren J stated at [16] and [134] the following:-

“It was common ground that the onus was on the Minister to establish that the statements were made or caused to be made by the respective applicants and that they were false or misleading in a material particular ...

...

Although the standard of proof which the Minister must satisfy is the civil one of the balance or preponderance of probabilities, I will find a statement by [the applicants] to have been false or misleading in a material particular only after exercising great care and caution and only if I am persuaded to that effect by clear or cogent or strict proof; cf Briginshaw v Briginshaw (1938) 60 CLR 336 at 343-344 ...”

127. Whilst it was acknowledged the Tribunal recognised the principles set out above it was argued that the Tribunal’s reasons for decision indicates it did not apply the appropriate standard of proof and therefore fell into jurisdictional error. Reference was also made to the decision of the Supreme Court of New South Wales – Court of Appeal in *Greyhound Racing Authority (NSW) v Bragg* (Unreported 22 December 2003). Specific reference was made to the judgment in that case where the Court states the following –

“What was here required was a comfortable level of satisfaction commensurate with the gravity of the charge, reached fairly and properly in accordance with the kind of processes appropriate to a Tribunal, not a Court of law ...”

128. The First Respondent submitted the Tribunal in its decision had stated the relevant standard of proof. Reference was made to the Tribunal’s decision where it states,

“17. The Tribunal notes that the Federal Court has ruled that the onus on proving the falsity of statements for purposes of the migration legislation lies with the Minister and that the standard of proof required in relation to such a breach, because of the serious nature of the consequences, involves ‘a high degree of satisfaction’; Jasbeer Singh v Minister for Immigration and Ethnic Affairs.”

129. (Court Book p.203)

130. It was submitted that there is no reason to infer the Tribunal did not apply the correct standard. It had strong evidence that the marriage

was contrived and it gave that evidence weight or sometimes great weight. It was argued there was no basis for concluding the Tribunal could not give such weight as it wished to the adverse evidence and therefore no basis for inferring it failed to apply the correct standard of proof.

Reasoning

131. In my view the Tribunal has cited and applied the correct standard of proof. It has then proceeded to analyse the evidence and consider whether it has been satisfied that that evidence reached the appropriate standard to its satisfaction. As indicated earlier in this judgment I am satisfied the Tribunal has provided details of its reasons based upon conclusions reasonably open to it free of jurisdictional error. It has also done so in a manner free of any failure to apply the appropriate standard of proof which I accept is the standard of proof accurately referred to by the Tribunal set out above. I can see no departure from the appropriate standard or the principles which apply in the relevant authorities referred to by Counsel during the course of submissions. Hence this ground fails.

Wrong Question of Law

Applicant's Submissions

132. It was argued the Tribunal asked and answered the wrong question.
133. It was argued that the Tribunal had asked and answered the wrong question by referring to the date of the application for the visa being 27 October 2000 when the correct date was 16 January 1998. The court should find that the Tribunal wrongly understood the visa application was made on 27 October 2000 and therefore it asked and answered the wrong question, giving rise to jurisdictional error. If the Tribunal, however, had delivered a well reasoned decision apart from this error, it was conceded that the court may infer that this was simply a typographical error.

First Respondent's Submissions

134. The First Respondent submitted that the error was nothing more than a slip and that the correct test had been applied (see *S14/2002 v Refugee Review Tribunal* [2004] FCAFC 171 at [30]-[34]).

Reasoning

135. In my view the incorrect reference to the date of the application was simply a typographical error. The Tribunal's decision otherwise in my view has been reasoned in a manner free of error and a typographical error of this kind is of no consequence. I note in passing, however, that in its decision the Tribunal had referred to the correct date on at least two other occasions. It referred to the correct date in paragraph 21 of its decision where it states relevantly:

“The review applicant applied for a subclass 309 (spouse) visa on 16 January 1998 ...”

136. It also referred to the correct date in its chronology (Court Book p.209).
137. It is clear to me that this is a mere typographical error and cannot provide any or any proper basis upon which the court is able to conclude jurisdictional error for the reasons given.

Conclusion

138. It follows therefore that the application should be dismissed with costs.

I certify that the preceding one hundred and thirty-seven (137) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 31 May 2007